Supreme Court, U. S.
FILED
SEP 30 1976
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States.

OCTOBER TERM, 1976.

No. **76-462**

MICHAEL PELLICCI,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Supreme Court of the United States.

OCTOBER TERM, 1976.

No.

MICHAEL PELLICCI,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

The Petitioner, Michael Pellicci, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in this proceeding on August 31, 1976, affirming the judgment of the United States District Court for the District of Massachusetts. The opinion of the Court of Appeals for the First Circuit is annexed hereto as Attachment "A."

Jurisdiction.

This Petition for Certiorari was filed within 30 days of August 31, 1976, and this Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. Whether there exists statutory authority for the waiver of a jury by a defendant after said jury has been impanelled and received evidence?

2. Whether, assuming arguendo, that such a waiver may be effectuated, the waiver in the case at bar was knowing and intelligently executed in view of the defendant not having been advised by his counsel or the court that the counsel for his co-defendant at trial had advised the court during a bench conference that said co-defendant was considering a plea of guilty?

3. Whether the trial court was in error, thereby denying the Petitioner due process of law, when refusing to grant an evidentiary hearing on a 28 U.S.C. § 2255 Petition, the allegations of which were not reflected in the record of trial?

Statement of the Case.

The Petitioner was originally indicted on January 23, 1974 for violations of Title 18 U.S.C. § 1955. On May 28, 1974, the matter pending against the Petitioner was moved for trial and a jury was impanelled and sworn. The presentation of evidence commenced on the following day.

On the third day of trial, May 31, 1974, the trial transcript reflects the following occurrence:

"THE COURT: Mr. Skarmeas there is some matter you want to take up with me.

"MR. BALLIRO: I have discussed the advisability of asking the United States Attorney and the Court, to agree to waive the jury. He has advised me that he is willing to sign a waiver of jury slip.

"THE COURT: Mr. Pellicci?

"MR. BALLIRO: Yes, your Honor.

"MR. BURKE: I have not discussed it with Mr. Savas. I have been discussing the possibility of a plea with him.
He said he would need possibly the weekend to think it over, get his financial affairs straightened out.

"THE COURT: He can straighten out over the weekend. He knows whether he is guilty or not better than anybody else in the courtroom.
I am not delaying anything over the weekend to have him think.

"MR. BURKE: I don't want you to get that impression.

"THE COURT: I want to make it perfectly clear.

"MR. BURKE: Let me talk to him."
(Tr-3-3)

"THE COURT: Okay. Did I understand you are agreeable to having the jury waived?

"MR. FRIEDMAN: No objection, your Honor.

"THE COURT: It is rather unusual in the middle of a case.

"MR. BALLIRO: I understand it is. I am frank to disclose the reason why I am anx-

ious to test it. It is a serious issue. It has to be litigated. It should be litigated.

"THE COURT: The government's evidence is fairly probative.

"MR. BALLIRO: I was not unmindful of that.

"THE COURT: Let us see what Mr. Burke wants to do. Whom do you have left?

"MR. FRIEDMAN: Mr. Vaughan is my principal witness, and Agent Vaules would testify.

"MR. BALLIRO: If the Court does approve of that, I envision considerably shortening the testimony. We might be able to stipulate.

"THE COURT: I don't want to have Mr. Vaughan, in view of the opening which Mr. Friedman made for the government—

"MR. BALLIRO: I am willing to shorten it up.

"MR. BURKE: Your Honor, Mr. Savas is willing to go along with Mr. Pellicci, with the waiver of jury.

(Tr-3-4)

"THE COURT: All right. Do we have a written form for that, someplace?

"THE CLERK: I have an old one.

"THE COURT: There is a form which says waiver of trial by jury.

(The Court reads the form.)"

After said bench conference between the court and counsel, the following took place within the hearing of the Petitioner but not of the presence of the jury.

"THE COURT: Mr. Pellicci, your attorney, Mr. Balliro, has advised me it is your desire not to continue this trial with the jury but to waive the jury and have me make the finding of either guilty or not guilty. Is that in accordance with your wishes?

"MR. PELLICCI: Yes, your Honor.

"THE COURT: Mr. Pellicci, we do have a printed form called a waiver of trial by jury. It simply says, now comes the defendant, Michael Pellicci and waives his right of trial by jury and requests that he be tried by the court without a jury.

I want to ask you before we go into anything else in connection with the matter whether you have discussed the matter with Mr. Balliro for whatever length you care to discuss it with him.

"MR. PELLICCI: Yes.

"THE COURT: You have an absolute right to continue this trial with that jury sitting here for the last two days and have them arrive at a verdict, either guilty or not guilty as the case may be.

"MR. PELLICCI: Yes, your Honor.

"THE COURT: Is it your decision to dispense with a jury and continue the case as a non-jury trial by me alone?"

(Tr 3-6)

"MR. PELLICCI: Yes, your Honor.

"THE COURT: Mr. Balliro told me he has no negotiations whatsoever with the attorney for the government, as to what possible sentence would be imposed, if you or Mr. Savas were found guilty.
Is that in accordance with your understanding?

"MR. PELLICCI: Yes.

"THE COURT: Mr. Savas

• • • • • • •

(Tr 3-7)

"THE COURT: There are a couple of forms here if both defendants wish to waive trial by jury, Mr. Friedman indicated he is agreeable to the waiver by trial by jury.
I told Mr. Balliro and Mr. Burke, if, after they explained to Mr. Pellicci and Mr. Savas their right to trial by jury, and they both told me they want to waive it. I also would agree to the waiver of the trial by jury.
I now have been handed by the clerk a document which reads, now comes the defendant, Michael Pellicci, and waives his right of trial by jury and requests that he be tried by the Court without a jury. It has what purports to be your signature. Did you in fact sign it?

"MR. PELLICCI: Yes.

"THE COURT: It is signed by Mr. Balliro and Mr. Friedman. I will now approve it. It is dated today's date.
Mr. Savas, I have a document which purports to be signed by you, now comes the defendant Charles Savas and waives his right . . ."

Thereafter, the jury was excused and the trial continued before the court. Said action occurred without the Petitioner having been advised by anyone that the court had been informed of the fact that Petitioner's co-defendant at trial was considering a plea of guilty. The Petitioner was subsequently found guilty as charged and on June 14, 1974, was sentenced to a term of imprisonment of five years and a fine of $20,000, the maximum provided by § 1955.

A timely notice of appeal was filed and the matter was heard in the United States Court of Appeals for the First Circuit, which resulted in the affirmance of conviction and a subsequent Petition for Writ of Certiorari was denied by the United States Supreme Court.

The Petitioner vehemently asserts that under the circumstances, the trial court was without authority to allow Petitioner to waive a jury which had been impanelled and received evidence for two days; and further, that had he been advised of the trial court's cognizance of the proclivity of his co-defendant at trial with regard to pleading guilty, he most assuredly would not have elected to proceed jury waived, assuming arguendo this could be legally accomplished.

In October of 1975, your instant Petitioner filed a Petition pursuant to Title 28 U.S.C. § 2255,* predicated upon

* Hereinafter referred to "2255" Petition.

the above-enumerated grounds. The original trial judge (the Honorable Andrew J. Caffrey) disqualified himself from ruling on said Petition and the cause was thereby re-assigned to the Honorable Walter J. Skinner.

Prior to a response having been filed by the Government, Petitioner's recently retained counsel filed a Motion for Evidentiary Hearing. The basis of said motion was that the facts alleged in the 2255 Petition were neither corroborated, nor refuted by the trial transcript, and that an evidentiary hearing was absolutely necessary in order to adequately resolve on the record the issues raised by the 2255 Petition. The Government responded by filing a Motion to Dismiss.

On January 21, 1976, Petitioner's counsel appeared before the Court relative to the Motion for Evidentiary Hearing. The Court announced its position that the Petitioner had no standing on the issue of the question of whether a jury could be waived in the middle of a case. The basis for the court's conclusion was twofold:

a) the Petitioner had requested that the jury be waived;

b) The propriety of said jury waiver was not raised upon direct appeal.

Relative to the issue of whether Petitioner's waiver of jury was intelligently and voluntarily made, the court denied Petitioner's Motion for an Evidentiary Hearing and stated that the allegations of the 2255 Petition, even if taken as truth, would not warrant any relief under the statute. The court was unequivocal in stating that it was accepting as true facts all the allegations of the 2255 Petition, but nevertheless granted the government's Motion to Dismiss without any evidentiary hearing. (The transcript of the proceeding before the Honorable Walter

J. Skinner of January 21, 1976 is reflected in the appendix hereto as Attachment "B.")

Your instant Petitioner filed a timely notice of appeal to the United States Court of Appeals for the First Circuit. After briefs being filed by both parties, the Court of Appeals rendered its decision on August 31, 1976, affirming the action of the District Court. In the course of the Court of Appeals' decision, it also accepted as truth the allegations contained in the 2255 Petition.

Reasons for Granting the Writ.

1. No Statutory Authority Exists for the Waiver of a Jury by a Defendant after Said Jury has been Impanelled and has Received Evidence.

Rule 23 of the Federal Rules of Criminal Procedure is the only Rule providing for an election by a defendant to waive a trial and to proceed before the Court alone. However, neither the subsections of that Rule, nor the annotated cases thereunder, provide that a defendant may waive a jury and proceed to trial before a Court alone after the jury has been impanelled, the trial has commenced and testimony has been presented to said jury for two days. It is to be noted that the instant situation is not one where, subsequent to a jury of 12 having been impanelled, a trial which had commenced was continued by stipulation before a jury composed of less than 12 members.

The opinion of the Court of Appeals notes that in Petitioner's brief to that Court, no cases were cited espousing his contention that it was improper to waive a jury in mid-trial. The Petitioner says that any case law standing for the proposition that a waiver of this type would be proper, was conspicuously absent from the Court of

Appeals' opinion. Likewise, no cases were cited by the Government upon which such a waiver could be legally substantiated. The Court of Appeals, in discussing this matter, further noted that the absence from Rule 23(a) of the Federal Rules of Criminal Procedure, of explicit language dealing with the waiver of a jury at mid-trial was an "understandable oversight" by the drafters of the Rule. Your Petitioner says that the opinion of the Court of Appeals in classifying the omission of any discussion relative to a mid-trial waiver of jury from Rule 23(a) was a strained and improper interpretation of the Rule and the legislative history of said Rule.

It is the contention of the Petitioner that absent the requisite statutory authority, the dismissal of the jury by the Court below, subsequent to its having been impanelled and having received for a period of two days, constituted a legal effect akin to a mistrial, without any compelling reasons or manifest necessity therefor. In *Gori* v. *United States,* 367 U.S. 364, 368, 81 S. Ct. 1523, 6 L. Ed. 2d 901 (1961), the Court defined the limits of a trial Court's discretion in declaring a mistrial:

> [w]here, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment.

See also, *United States* v. *Jorn,* 400 U.S. 470, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971).

Since the dismissal of the jury by the Court below was, under the circumstances, not sanctioned by statute, the legal result thereof was the unlawful declaration of a mistrial subsequent to jeopardy having attached upon the jury having been impanelled. *Wade* v. *Hunter,* 336 U.S. 684, 69 S. Ct. 834, 93 L. Ed. 974 (1949). Jeopardy so attaches when a jury has been impanelled, even though no evidence has yet been presented to it. *Downum* v. *United States,* 372 U.S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100 (1963).

2. Even Assuming Arguendo that a Jury Waiver may be Effectuated under the Circumstances Hereinabove Described, said Waiver by the Petitioner Was Not a Knowing and Intelligent One, Since He had Not been Advised by the Court or His Counsel that His Co-defendant's Attorney had Advised the Trial Court at a Bench Conference of Petitioner's Co-defendant's Consideration of a Guilty Plea.

Accordingly, the Petitioner submits that his conviction should be reversed and the indictment against him dismissed.

The constitutional rights which are afforded each and every citizen may be waived, but it is incumbent upon the court when accepting a waiver of constitutional rights to make an informed and affirmative determination that the waiver is intelligently and knowingly made. *Boykin* v. *Alabama,* 395 U.S. 238, 89 S. Ct. 1709 23 L. Ed. 2d 274 (1969). It is the obligation of the judge accepting a waiver of constitutional rights to preserve a record of the proceedings in the event that the waiver is subsequently questioned on appeal or in a collateral matter.

The proceeding during which constitutional rights are waived must not be a sham or a pretense. Instead, they

must be conducted in such a manner so as to insure that sufficient facts are elicited from which the judge may make an enlightened decision that the waiver is intelligently and knowingly made. *Carnley* v. *Cochran,* 369 U.S. 506, 82 S. Ct. 884, 8 L. Ed. 2d 70 (1962).

Trial courts must assure themselves in canvassing the matter with the accused to make sure he has a full understanding of all circumstances in any way related to his desire to waiver a constitutionally guaranteed right, i.e., the right to trial by jury.

The Court of Appeals like the Trial Court, assumed that all of Petitioner's factual claims enumerated in his 2255 Petition were true. Even in view of this, the opinion of the Court of Appeals noted relative to the remark of Petitioner's Co-Defendant's counsel having informed the court relative to his consideration of a plea of guilty that Petitioner's attorney "heard the remark at issue, and he had an opportunity to inform the [Petitioner] or to recommend the withdrawal of [Petitioner's] waiver." The original 2255 Petition specifically asserted that no discussions were had between the Petitioner and his trial counsel after the bench conference during which the remark at issue took place. The Petitioner further alleged in the 2255 Petition that he was completely unaware of said remark and that had he known of said remark, he would most assuredly have altered his plans to waive the jury and continue the trial before the Court. Thus, the opinion of the Court of Appeals appears to be inconsistent. In the first instance, they assume that all the facts alleged and pleaded by the Petitioner were true, while at the same time contraverting said allegations in order to vitiate the Petitioner's contention that his decision to waive the jury was unknowing and unintelligently made.

Therefore, since the record of the case at bar refutes a knowing waiver of trial by jury by the Petitioner, it is respectfully submitted that the Petitioner's conviction should be reversed.

3. The Trial Court Was in Error in Refusing to Grant an Evidentiary Hearing on Petitioner's 2255 Petition, the Allegations of Which were Not Refuted in the Trial Transcript.

When there exists a factual dispute as to whether a defendant's fundamental rights have been infringed, an evidentiary hearing should be held on a 2255 motion. *Mason* v. *Ciccone,* 517 F. 2d 73 (8th Cir. 1975). Such an evidentiary hearing is also necessary where the allegations of fact contained in said petition could not be fully investigated and resolved by reference to the trial transcript. See *Mixen* v. *United States,* 469 F. 2d 203 (8th Cir. 1972).

Indeed, Title 28 U.S.C. § 2255 states in pertinent part:

> Unless the Motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

In *Machibroda* v. *United States,* 368 U.S. 487, 82 S. Ct. 510, 7 L. Ed. 2d 473 (1962), the court held:

> The trial judge is without authority to deny a writ with such factual allegations as presented in the instant case on the basis of personal knowledge. The trial judge at arraignment, the attorney who represented the relator, the district attorney, and the relator himself, have the only particular knowledge of

> the circumstances which would prove or disprove his allegations . . . and evidentiary hearing is the only vehicle for the disclosure of this information . . . .

See also, *Brady* v. *United States,* 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970); *Parker* v. *North Carolina,* 397 U.S. 790, 90 S. Ct. 1458, 25 L. Ed. 2d 785 (1970); *McMann* v. *Richardson,* 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970).

In *Porter* v. *United States,* 298 F. 2d 461 (5th Cir. 1962), the Court, in addressing itself to the issue of whether an evidentiary hearing pursuant to a 2255 motion was necessary, stated:

> But since the record does not demonstrate *conclusively* that they (the allegations of the petition) are not so, the trial Court, as we have many times held, was *obligated* [emphasis added] to hold a hearing to ascertain the truth of these charges set forth with adequate factual particularity.

Conclusion.

For the reasons stated herein, a Writ of Certiorari should issue to review the judgment of the First Circuit Court of Appeals.

Respectfully submitted,

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Appendix.

ATTACHMENT "A."

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 76-1056.

MICHAEL PELLICCI,
Petitioner, Appellant,

v.

UNITED STATES OF AMERICA,
Respondent, Appellee.

JUDGMENT

Entered August 31, 1976

This cause was submitted on briefs on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is affirmed.

By the Court:
/s/ Dana H. Gallup
Clerk.

ATTACHMENT "B."

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action 75-4547 SKINNER, D. J.

MICHAEL PELLICCI
V.
UNITED STATES OF AMERICA

MOTION TO DISMISS

APPEARANCES:

William Cintolo, Esquire, One Center Plaza,
Boston, Massachusetts, on behalf of the Plaintiff.
Martin Boudreau, Esquire, Special Attorney,
Department of Justice, on behalf of the Government.

Courtroom No. 6
Federal Building
Boston, Massachusetts
2:00 p.m., Wednesday,
January 21, 1976.

[Tr. 2]

THE COURT: This is the matter of Pellicci versus the United States, Civil Action 75-4547.

There is a matter of the prior record in the case that I would like to inquire of before you begin your arguments.

Was the criminal case of United States versus Pellicci appealed?

MR. BOUDREAU: Yes, your Honor, it was. It was appealed to the First Circuit. The conviction was affirmed and writ of certiorari was sought at the Supreme Court and the writ was denied, your Honor.

THE COURT: Was the issue of the validity of the jury waiver, after the commencement of the trial, raised on that appeal?

MR. BOUDREAU: No, your Honor, it was not.

The single contention on appeal to the First Circuit was the propriety of the then Acting Attorney General Bork, signing the wiretap, which was involved in that case, your Honor.

THE COURT: Oh, for heaven's sake, is that all they went up on?

MR. BOUDREAU: Yes, your Honor.

THE COURT: Well, I've ruled on that myself, in another matter. That's been disposed of by the Circuit?

[Tr. 3]

MR. BOUDREAU: Yes, your Honor.

THE COURT: I'm glad to know that.

Well, all right. We're here now on this occasion on the Motion to Dismiss.

MR. BOUDREAU: Yes, your Honor.

THE COURT: All right, Mr. Boudreau.

MR. BOUDREAU: Your Honor, in his Motion to Vacate the Judgment, petitioner asserts essentially three grounds: First that his waiver of trial by jury was not knowingly and intentionally made.

Secondly, that waiver by trial is impermissible after the commencement of trial.

Thirdly, that his counsel acted contrary to his best interests in not advising him of what transpired at a bench conference.

THE COURT: Well, the first two issues were opened on appeal, were they not?

MR. BOUDREAU: That is correct, your Honor.

THE COURT: What about that? Does failure to present those matters to the Court of Appeals foreclose their consideration under 2235 [sic] motion?

MR. BOUDREAU: I think it does, your Honor. The defendant had the opportunity to raise those questions following his appeal from the conviction.

THE COURT: Have you not any authority for that

[Tr. 4]

proposition?

MR. BOUDREAU: No, your Honor, I do not.

THE COURT: Does it appear in the statute anywhere? Well, all right, go on to the next point, then.

MR. BOUDREAU: The single factual basis upon which the petitioner asserts these grounds is the contents of a bench conference out of the presence of petitioner wherein the counsel for the co-defendant made the single statement, "I have been discussing the possibility of a plea with my client."

That, your Honor, that statement was made by counsel for the co-defendant in the context of the approach by counsel by the petitioner, wherein he advised the Court that he was seeking a waiver of the trial by jury, and it occurred in response to a question from the Court whether the counsel for the co-defendant had discussed it with his client. That single statement was made. There was no further reference to a reference to a plea negotiation, nor is there any indication that any discussion was ever had with the Government.

After that, and further on in the same colloquy, the retained counsel for the petitioner made the statement and

[Tr. 5]

with respect to the desire to waive the jury during the course of the trial, that he was aware that it was somewhat unusual for this procedure to be taken, and stated that, "I am frank to disclose the reason why I'm anxious to test it. It is a serious issue. It has to be litigated. It should be litigated."

THE COURT: Does it appear in the record as a present minute?

MR. BOUDREAU: Yes, your Honor.

THE COURT: Attached to the Complaint?

MR. BOUDREAU: That is correct, your Honor. Any reference I make to the record of the proceeding are those contained in the motion filed by the petitioner himself.

I think it is clear, your Honor, that the question of waiving the jury during the course of the trial was a conscious tactic by the defendant and his counsel to create a possible issue for appeal if the defendant were convicted at the conclusion of the trial.

Following that, your Honor, the trial Court then made personal inquiry of the petitioner concerning his desire to waive the jury. And in very specific terms, your Honor, the trial Court advised the petitioner that he had an absolute right to continue trial before the jury. The fact that waiver

[Tr. 6]

of — continued trial before jury, and have the jury arrive at a finding of either guilty or not guilty. And that if he were to waive his right to jury trial, that the Court would then make the finding of either guilty or not guilty.

The petitioner indicated at the outset that he understood this right, and then at the conclusion, again, of the inquiry, the Court stated, "You have an absolute right to continue this trial with the jury sitting here for the last two days

and have them arrive at a verdict, either guilty or not guilty, as the case may be."

The petitioner responded, "Yes, your Honor."

"The Court: Is it your decision to dispense with the jury and continue the case by a non jury trial?"

Wherein the petitioner responded, "Affirmative."

THE COURT: Where does this appear?

MR. BOUDREAU: Pages 9 and 10.

THE COURT: All right, I see it.

MR. BOUDREAU: The constitutional right that is involved, your Honor, is the defendant's right of trial to jury by his peers. It's unquestioned that, I think, a defendant can waive a trial by jury, and the determination as to whether a particular waiver is effective and is know-

[Tr. 7]

ing and voluntarily revolves around the facts of the case, and inquiry as to where the petitioner understands the constitutional right with which he is concerned and understands the consequences of giving up that right. I think the Court in its inquiry made it explicitly clear on two occasions what the right was that Mr. Pellicci had and the consequences of giving that right up.

It also indicates in the same colloquy, the Court asked if the petitioner had had adequate opportunity to discuss the request to his satisfaction with his counsel, and Mr. Pellicci said that he had. It's clear on the record, your Honor, as cited by the petitioner, himself, that the right to which the discussion related was expressly and explicitly explained to him. He had explicitly stated that he had the opportunity to discuss this completely and fully with his counsel, and knowing that he had an absolute right to trial by jury chose to give up that right.

The determination of whether or not a waiver was knowingly and intelligently made is the determination of whether

the defendant waiving the right understood that right and understood the consequences of giving up that right.

It is also important, I think, your Honor, to consider the

[Tr. 8]

fact that the waiver of jury during the course of trial was part of a conscious trial tactic by the defendant and his counsel. Moreover, the petitioner does not allege that any sort of prejudice inured to him by continuing with trial by the Court alone. I think he simply says, your Honor, that the mere fact that he was unaware of the single statement by co-defendant's counsel, entitles him to relief, because had he known that he would not have made the waiver.

I submit, your Honor, that is not the test. The test is whether he understood the right which was the subject of the discussion and whether he understood the consequences of giving up that right.

The decision to waive the jury during the course of trial is a conscious trial tactic, and the First Circuit in the case of Moran v. Hogan has discussed the question of post trial attacks upon convictions dealing with the adequacy of counsel when a claim is made that trial tactics were employed which were not to the benefit of the then defendant. And the First Circuit has said that conscious trial tactics are not subject for a post conviction relief, even if an egregious error is made.

Well, the trial tactic here is clearly set forth, I think, in

[Tr. 9]

the words of the petitioner's trial counsel, and the waiver of his right to trial by jury was clearly and explicitly set forth on the record as is required; and from the record in the case, there is no question that the petitioner understood his right and understood the consequences of giving it up.

If the determination were to be made on the subjective mind of a defendant, the possibility would be limitless. If a Court sometime during the course of a jury trial expressed an opinion at a bench conference to counsel about the sufficiency of evidence, is a defendant then entitled to be explicitly made aware of that fact by his counsel so that he then has the choice of waiving the trial by jury? I think not, your Honor. If the test of knowing involuntary waiver is the subjective state of mind of a defendant after he has been convicted, he can sit back and look at the record and conjure up any number of means for attempting to vitiate the waiver.

With respect to the waiver of the jury during the course of the trial, your Honor, Rule 23 provides that a defendant may waive trial by jury. There is no limitation contained within the statute providing that it must be done prior to trial, nor is there any authority in the case law dealing with

[Tr. 10]

waiver of trial by jury, which says that it has to be at a pretrial stage.

The right is one which is afforded to the defendant for his protection, and if he knowingly and intelligently chooses to waive that right, he cannot later complain that it was not tactically feasible to do it. I think, your Honor, this is what this petitioner is doing. He's simply saying that it is now a matter of bad tactics.

In the case of Tindall (phonetics) versus United States, your Honor, the defendant—this dealt with the voluntariness of a guilty plea. The defendant, Tindell, was serving a sentence in a State Court. He was then indicted federally and pleaded guilty to those charges. He received a consecutive sentence to the one that he was serving in the State Court. He then attacked the voluntariness of his guilty pleas, saying, "Had I known that the sentence would be consecutive, I wouldn't have pled guilty."

The Appellate Court examined the trial record with respect to a determination of whether the record of the case met the requirements of Rule 11, requirement that the inquiry by the trial court was satisfied that the plea was voluntary, that the defendant understood what he was charged with, his rights, what he was giving up, and the

[Tr. 11]

possible sentence. "Had I known," an ingredient that the petitioner injected after the sentence was imposed consecutively, was dismissed by the Appellate Court on the grounds that the objective record was that the defendant knew what his rights were and what the consequences of giving up those rights were.

I would submit, your Honor, the petitioner, Pellicci, is in exactly the same position.

MR. CINTOLO: Your Honor, if it please the Court, if I first might address myself to the rhetorical question asked by the Court with regard to whether or not this point had been raised in the appeal and whether or not that would affect his rights to raise this issue in this 2255 motion.

THE COURT: It wasn't a rhetorical question at all.

MR. CINTOLO: If it was a direct question—

THE COURT: It's a question to which I hope to find an answer.

MR. CINTOLO: In that respect, your Honor, I direct the Court's attention to two cases: The first case being Williams versus United States, which is reported at 481 F. 2d, 339, and it's out of the Circuit Court of New York. It's a 1973 case.

[Tr. 12]

The second case being Moore versus United States, which is out of the Circuit Court of California, 1972, 464 F. 2d, 663.

I believe the standard used, your Honor, is whether the right was available to him, whether the opportunity to appeal a specific issue was available to him, and whether or not the reason for not using that issue or litigating that issue on the appeal was done on a conscious belief that you would have it for a subsequent motion and basically get two bites at the apple. If it is something that is not raised at the appeal, your Honor, and something new that has not been discussed as yet, the 2255 motion would be able to encompass that avenue.

THE COURT: Let's take a look at all of these things.

Certainly, he knew he had waived his right to jury in the middle of the trial. So on the question of whether that is authorized under any of the rules, was open on appeal, right?

MR. CINTOLO: Yes, your Honor.

THE COURT: By the time the case came on for appeal, the transcript had been prepared, had it not?

MR. CINTOLO: I don't know, your Honor.

[Tr. 13]

THE COURT: Have you ever heard of a case going up without a transcript?

MR. CINTOLO: I have not, but I have no factual basis on which to answer that, your Honor.

THE COURT: Go ahead.

MR. CINTOLO: Secondly, your Honor, my brother makes reference to one statement being set out through the entire petition upon which the petitioner is relying upon to overturn this conviction. I would most respectfully say, your Honor, there are other statements that are contained within the body of the petition, which the petitioner believes, had he known had taken place it would have materially altered his decision as to whether or not to waive his

right to continue with a jury and be tried before a court.

My brother was right when he pointed out that part of the statement regarding the possibility of the co-defendant pleading guilty. If your Honor will read on further—

THE COURT: "I have been discussing the possibility of a plea with him."

MR. CINTOLO: Yes, further down on that same page, your Honor, is a statement made by the Court with regard —it appears right after it says, "transcript, 33," and it's the second statement by the Court, wherein the Court says,

[Tr. 14]

"It is unusual in this case."

"Unusual in the middle of a case, your Honor." My brother has interpreted Mr. Balliro's response to that to mean he was interpreting that he had to litigate the possibility of waiving a jury in the middle of a case, your Honor. I would say, your Honor, that is ambiguous on its face, and my brother's statement is merely conclusory as to what he meant by that.

THE COURT: I don't consider that your man has any standing on the issue of the question of whether a jury may be waived in the middle of the case. First of all, he asked for it.

MR. CINTOLO: Yes, your Honor.

THE COURT: Secondly, if he didn't think it was proper to do it, he had the opportunity to raise the issue on appeal.

MR. CINTOLO: I'm bringing this one up, your Honor—

THE COURT: Yes.

MR. CINTOLO: —not so much to say this is one of the reasons or one of the facts my client should have been aware of, I'm bringing this up for the fact, your Honor, that my brother counsel has stated that this meant that Mr. Balliro felt that the issue of waiving the jury in the middle of the trial should be litigated.

[Tr. 15]

THE COURT: I really don't care. I don't think it really matters what Mr. Balliro is thinking. I'm not really paying any attention to that part of Mr. Boudreau's argument, because I think there is more compelling reason to dispose of the issue.

MR. CINTOLO: Okay, your Honor.

The next response by the Court after that statement by Mr. Balliro, I think, is something that the petitioner should have been aware of. Wherein the Court says, "The Government's evidence is fairly probative," meaning that he heard three days of evidence, your Honor.

THE COURT: It was fairly probative. That means that he considers that he was justified in letting it in. That is all that means.

MR. CINTOLO: Fairly probative, your Honor, could also mean that there was enough evidence in at that point in time upon which he could make a determination of the defendant's guilt or innocence.

THE COURT: I don't think that is a fair conclusion. It's fairly probative.

MR. CINTOLO: The Government's evidence is fairly probative.

THE COURT: Has a tendency to establish the legal

[Tr. 16]

sufficiency of the charge in the indictment. No, I don't think it goes any further than that. Certainly, there is no necessary implication. Of course, I have no idea of what was in Judge Caffrey's mind. In terms of what he said, I don't think there is any necessary implication that this means that he had decided the case.

MR. CINTOLO: Yes, your Honor.

With regard to what the United States Attorney said with regard to certain statements being made, and he read the portions of the transcript and said that he believed that the words and phrases used in the transcript were sufficient to connote that the action taken by the defendant and defendant's counsel was conscious trial tactic—

THE COURT: That is not important.

MR. CINTOLO: Yes, your Honor.

THE COURT: I don't care whether it was or not. The point is, if he was going to change his mind about it, the time is between the time of trial and the time of appeal. I don't think they would have been very much more, frankly, more sympathetic to a fellow who asked for something and then claims that having gotten it that he's been denied his constitutional right. I don't think that is a very promising posture to be in.

[Tr. 17]

MR. CINTOLO: Your Honor, if I might, my brother, I believe, has adequately stated the standards upon which a Court will make a determination as to whether or not a waiver of a constitutional right will be sufficient. And those standards being that they be knowingly and intelligent. In order to be knowingly, your Honor, the defendant must be sufficiently apprised of all the facts upon which he can make an enlightened and reasonable determination of what his course of action might be.

THE COURT: By intelligent it doesn't mean brilliant.

MR. CINTOLO: No not brilliant, only what the possible consequences would be, your Honor.

There has been some discussion in the transcript itself, as to whether or not he had sufficient opportunity to discuss with his counsel the propriety of doing what he did, your Honor. I believe the proper question should not be prior to coming into Court that day whether or not he discussed

it with his counsel, but whether between his first determination coming in that morning and between that bench conference, whether there was any discussion between those

[Tr. 18]

times at which time defendant's counsel informed him of what had transpired at the bench conference and had brought those things to his attention, wether or not those actions would have materially affected his desire to continue and to couch his responses to the Court's questions differently. Had there been discussion between Mr. Balliro and Mr. Pellicci after that bench conference had occurred, wherein Mr. Balliro had discussed with Mr. Pellicci what transpired at that bench conference and what the Judge had said, and what Mr. Burke had said in response to Mr. Savis, then, your Honor, I think my client, Mr. Pellicci, should have had the right to be apprised of those facts. Where he wasn't apprised of those facts and it doesn't appear on the record that he was or was not apprised of these facts, that is why we want an evidentiary hearing, so that we could resolve some of these things.

Had he been apprised of what transpired at these bench conferences and made his response to the Judge's inquiries in the fashion he did in the transcript, I don't believe we would have any grounds in which to base anything, your Honor.

I'm basing my remarks on some preliminary discussion we had with my client, wherein he said after having dis-

[Tr. 19]

cussed it with Mr. Balliro and after having gone into Court that day, he had no discussions with Mr. Balliro after that time and after the bench conference. He contends, now, your Honor, as I do contend for him, that had he been aware of these things, his decision to waive the jury would

have been materially altered, and he probably would have continued the trial with the jury that was sitting there.

I'm saying, your Honor, unless we have an evidentiary hearing to find out from Mr. Balliro, to find out whether or not he had any discussions with Mr. Pellicci at this time, we are at a crossroads, we don't know one way or the other.

THE COURT: I am inclined to take the position that even if everything that is alleged in this petition is true, that these allegations would not warrant, in view of this transcript which is part of the petition, these allegations would not warrant proceeding any further on this complaint under 2255. Having taken that view, it follows that I am going to allow the Government's Motion to Dismiss.

MR. CINTOLO: Yes, your Honor.

THE COURT: And I now do that.

MR. CINTOLO: Thank you, very much, your Honor.

[Tr. 20]

Your Honor, excuse me, might I just understand the Court's position, so I might have it clear in my mind. The Court's position is that even assuming everything to be true that is alleged in the petition, the Court would see that there is no grounds for relief?

THE COURT: That is the only basis for a motion under Rule 12(b)(6) can be granted. You take the facts alleged as being so, as if they had been proved.

[Whereupon the hearing was concluded.]

ATTACHMENT "C."

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

No 76-1056

MICHAEL PELLICCI,
Petitioner, Appellant,
v.
UNITED STATES OF AMERICA,
Respondent, Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF MASSACHUSETTS
[Hon. Walter Jay Skinner, U.S. District Judge]

Before Coffin, *Chief Judge*,
McEntee and Campbell, *Circuit Judges*.

Gerald Alch and *William J. Cintolo* on brief for appellant.
James N. Gabriel, United States Attorney, *Gerald E. McDowell*, and *Stephen H. Jigger*, Special Attorneys, United States Department of Justice on brief for appellee.

August 31, 1976

COFFIN, *Chief Judge*. This is an appeal from the denial of a motion under 28 U.S.C. § 2255. The appellant was tried with a co-defendant in 1974. On the third day of his jury trial, the appellant's attorney asked for a conference at the bench. He told the judge that his client wanted to "waive the jury". The judge then asked the co-defendant's attorney if his client would agree to this move. The attorney said "I have not discussed it with [him]. I have been discussing the possibility of a [guilty] plea with him." The appellant was not present when these words were spoken, though his attorney was. After consulting his attorney, the co-defendant agreed to the waiver. Both defendants signed "waiver of jury" forms, and the trial judge interrogated each, informing them of their right to a jury trial and making sure that no promises of a reduced sentence had been offered by the prosecution. The trial then proceeded without a jury. Appellant's claims for relief grow out of these events.

I.

Appellant first claims that trial by jury cannot be waived once the trial has begun.* This argument has no merit. The only relevant provision is Federal Rule of Criminal Procedure 23(a):

> "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."

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* The government makes the following argument: appellant should have raised this issue on appeal, and, having failed to do so, he cannot raise it now. There may be something to this argument, but we need not consider it. We reject the claim in any event.

The rule itself contains no hint that waivers during trial are to be treated differently from waivers before trial. Petitioner cites no case taking his view and suggests no reason why we should adopt such a distinction.

Rule 23(b), it is true, speaks more plainly; it permits the parties to agree on a jury of fewer than twelve "at any time before verdict". We do not infer that rule 23(a) is silent deliberately. The drafter's omission was an understandable oversight. Death and sickness in the jury box make 23(b) waivers during trial a common occurrence, while 23(a) waivers during trial are rare. They are rare in part because the government or the court may not agree to the waiver after "a substantial amount of court time and jury time [has been] consumed and wasted in the selection of a jury that is not used." *United States* v. *Ceja,* 451 F. 2d 399, 402 n. 2 (1st Cir. 1971).

II.

Appellant's second claim has a bit more color to it. He now says that he would not have waived his right to a jury trial if he had known what his co-defendant's counsel said to the trial judge in conference; since the judge knew of the possible guilty plea and the jury did not, this information might have influenced appellant's decision. A jury trial may be waived only with the "express and intelligent consent of the defendant." *Patton* v. *United States,* 281 U.S. 276, 312 (1930). We have little guidance from the Supreme Court or the other circuits on how much information a defendant must have before his waiver of jury trial is "intelligent". But several factors lead to the conclusion that this appellant's waiver meets the constitutional standard.

First, the record shows that the appellant knew he had "an absolute right to continue this trial with that jury

sitting here for the last two days and [to] have them arrive at a verdict, either guilty or not guilty as the case may be." The record also shows that no negotiations about possible sentences took place. Further, appellant's attorney heard the remark at issue, and he had an opportunity to inform the appellant or to recommend the withdrawal of appellant's waiver. Finally, the remark was relevant but far from crucial to an informed decision to waive jury trial. In these circumstances, appellant's waiver of a jury trial was "intelligent".

III.

Appellant's final objection is that the court below denied his request for an evidentiary hearing. He must be given one "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief". 28 U.S.C. § 2255. Like the trial court, we have assumed that all of appellant's factual claims are true; even so, they fail to establish a legal ground for relief. An evidentiary hearing would be useless. *Cf. Machibroada* v. *United States,* 368 U.S. 487, 493 (1962).

Affirmed.

ATTACHMENT "D."

FED. R. CRIM. P.
RULE 23.

TRIAL BY JURY OR BY THE COURT

(a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

(b) Jury of Less Than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12.

(c) Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

Supreme Court, U. S.
FILED
DEC 7 1976
MICHAEL RODAK, JR., CLERK

No. 76-462

In the Supreme Court of the United States

OCTOBER TERM, 1976

MICHAEL PELLICCI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 30-33) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1976. The petition for a writ of certiorari was filed on September 30, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner may utilize 28 U.S.C. 2255 to challenge for the first time the validity of his decision to waive a jury in the middle of trial, and, if he may, whether his challenge has merit.

STATEMENT

After a jury-waived trial in the United States District Court for the District of Massachusetts, petitioner was convicted of conducting an illegal gambling business with five or more persons, in violation of 18 U.S.C. 1955. He was sentenced to five years' imprisonment and fined $20,000, the maximum penalty under the statute. The conviction was affirmed by the court of appeals, *United States* v. *Pellicci*, 504 F. 2d 1106 (C.A. 1), certiorari denied, 419 U.S. 1122.

Petitioner's trial began before a jury. But after two days of testimony, petitioner's counsel told the court that petitioner wanted to excuse the jury and continue the trial before the court alone. Counsel stated, as his reason for requesting the waiver at that time, that "[i]t is a serious issue. It has to be litigated. It should be litigated" (Pet. 3-4). The court and the prosecution agreed to the waiver, and petitioner signed a written waiver form. The trial judge then personally questioned petitioner to insure that the waiver was being made voluntarily, with the advice of counsel, and without any inducement from the government (Pet. 2-7).

Following affirmance of his conviction on direct appeal, petitioner sought post-conviction review under 28 U.S.C. 2255, arguing for the first time that the waiver was not intelligently made and was prohibited by Rule 23 of the Federal Rules of Criminal Procedure. Both the district court and the court of appeals rejected his arguments (Pet. App. 16-29, 30-33).

ARGUMENT

1. Petitioner's claim for relief should be denied because of his failure to raise it either at trial or on direct appeal. See *Sunal* v. *Large*, 332 U.S. 174. In *Estelle* v. *Williams*, No. 74-676, decided May 3, 1976, this Court ruled that a

defendant whose attorney did not object at trial to his client's being tried in prison clothes could not raise the issue on habeas corpus. As the Court there stated (slip op. 11):

> Under our adversary system, once a defendant has the assistance of counsel, the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system.

This rationale is equally applicable here. Petitioner's decision at trial to excuse the jury was made voluntarily, for tactical reasons, and with the advice of counsel. Having made no mention of this issue on appeal, petitioner should not be heard to raise it on collateral attack.

2. In any event, petitioner's arguments challenging the waiver are insubstantial. He contends that the Federal Rules of Criminal Procedure prohibit waiving the jury in the middle of a trial. He offers no precedent to support this argument. The applicable rule of Fed. R. Crim. P. 23(a) provides that:

> Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

As the court below correctly pointed out, "[t]he rule itself contains no hint that waivers during trial are to be treated differently from waivers before trial" (Pet. App. 32).

3. Petitioner argues further that he would not have waived a trial by jury if he had known that his co-defendant's lawyer had told the court at a bench con-

ference that he had "been discussing the possibility of a plea" with his client.[1]

Petitioner's argument is with his lawyer, not with the government or the court.[2] Defendant's counsel knew of the remark and had ample opportunity to mention it to petitioner. Regardless of whether he did, he evidently did not think it significant enough to outweigh whatever tactical advantages he hoped to gain by excusing the jury in mid-trial.[3] "I am frank to disclose the reason why I am anxious to test it," he explained to the court. "It is a serious issue. It has to be litigated. It should be litigated" (Pet. 3-4).

As the court of appeals pointed out, petitioner was carefully advised by the court that he had "an absolute right to continue this trial with that jury sitting here for the last two days and [to] have them arrive at a verdict, either guilty or not guilty as the case may be" (Pet. App. 33). Petitioner also said he had sufficiently discussed the matter with his attorney and, in response to the court's questions, repeatedly stated his unequivocal desire to waive the jury (Pet. 5-6).[4]

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[1]In response to the court's question whether his client would agree to petitioner's request to excuse the jury, the co-defendant's attorney said, "I have not discussed it with [him]. I have been discussing the possibility of a plea with him. He said he would need possibly the weekend to think it over, and get his financial affairs straightened out" (Pet. 3).

[2]There is no claim here of ineffective assistance of counsel.

[3]Moreover, petitioner executed an intelligent waiver of the jury. There is certainly nothing in the remark itself to make the subsequent waiver invalid *per se*. It was, as the court of appeals said, "relevant but far from crucial to an informed decision to waive jury trial" (Pet. App. 33).

[4]Petitioner contends that the court below improperly denied his request for an evidentiary hearing to determine whether petitioner actually knew of the remark made by his co-defendant's lawyer. But, as the court of appeals correctly decided, an evidentiary hearing on this question would be useless. Since both courts below decided that petitioner was entitled to no relief, whether or not he was aware of the remark to the judge, there would be no purpose in any further inquiry (Pet. App. 33).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1976.

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